Filed 10/13/09 In re B.P. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re B.P., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. B.P., Defendant and Appellant.	A121536 (Sonoma County Super. Ct. No. 34856J) **ORDER MODIFYING OPINION AND DENYING REHEARING** **[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the nonpublished opinion filed September 17, 2009, be modified as follows:

1. Delete the final three full paragraphs in the Discussion section of the opinion, beginning with the paragraph commencing with "Since appellant never argued . . ." half way down page 15, and ending with the cite to *People v. Watson* at the end of that last paragraph in the Discussion section on page 16. Footnote 6 at the bottom of page 16 should also be deleted in its entirety.

2. Replace the deleted portions described above with the following new text, and add a new footnote 6, as the final paragraphs and footnote in the Discussion section of the opinion as follows:

Similarly, appellant now argues that, once the court permitted cross-examination of Salkin regarding the prior incident, the court "itself created another theory of admissibility for the evidence by recalling Salkin to the stand." According to appellant, once Salkin had testified on this point, the defense was entitled to prove his testimony false, pursuant to Evidence Code section 780, subdivision (i), which permits the admission of evidence to prove or disprove "the existence or nonexistence of any fact testified to by [the witness]."

We need not address whether appellant's failure to raise these theories in the juvenile court precludes him from raising them on appeal because we conclude that any such error was harmless.[6]

As previously discussed (see part I, *ante*), appellant had already delayed both Deputy Salkin and Office Clark by ignoring their commands and fleeing from them before any of the alleged misconduct by Salkin could have occurred. Thus, any evidence suggesting that Salkin had subsequently threatened and/or kicked appellant would not have changed the result. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Furthermore, in his reply brief, appellant asserts that the defense was that Salkin had fabricated his account of the events surrounding appellant's arrest and that Salkin had actually driven up to where appellant "stood next to a taco truck, jumped out and pointed his gun at [appellant], kicked him in the stomach, and handcuffed him." Given that both Salkin and Clark—against whom no impeachment evidence was offered—testified consistently to a completely different set of circumstances, it is highly unlikely that admission of the *Pitchess* evidence would have changed the result. (See *People v. Watson*, at p. 836.)

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[6] In our original opinion, we resolved this issue against appellant on two alternative grounds: (1) failure to raise these theories of admissibility in the trial court, and (2) harmless error. In a petition for rehearing, appellant has argued that

rehearing must be granted because he was not given the opportunity to brief the issue of waiver. (See Gov. Code § 68081.) It is arguable whether or not the question of waiver was "fairly included within the issues raised." (See *People v. Alice* (2007) 41 Cal.4th 668, 679.) Regardless, as we previously held, any error in refusing to admit this evidence would have been harmless in any case. In this opinion, modified on denial of rehearing, we therefore delete the discussion of waiver and simply hold that appellant cannot show he was prejudiced by the alleged evidentiary error.

3. The Disposition section on page 16 of the opinion shall remain the same.

There is no change in the judgment.

4. Appellant's petition for rehearing is denied.

Dated: _____

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Kline, P.J.